HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII, Rule 32(2) (b)

Description of the case.

A.O. No. 477 of 2005

The New India Assurance Co.. Appellant

Versus

Smt. Gyanti Devi & another Respondents

Approved for reporting.

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Not approved for reporting

Date of decision 10.11.2006

Initial of Judge

HIGH COURT OF UTTRANCHAL AT NAINITAL

Appeal Against Award No. 477 of 2005

The New India Assurance co. Ltd; through its Senior Divisional Manager, Nainital Road , Haldwani .....Appellant

Versus

1. Smt. Gyanti Devi w/o Sri Krishna Bahadur Thapa, Village Chakarpur, Tehsil Gadarpur, District Udham Singh Nagar
2. Manager, S.N.T. Plywood Industries Private Ltd; Gadarpur, District Udham Singh Nagar

...Respondents

Sri R.B. Agarwal for the appellant
None for the respondents

Dated: November 10, 2006

Hon'ble Rajesh Tandon, J.

1) Present appeal has been preferred against the judgment and award dated 31.8.2005 passed by the Commissioner, Workmen's Compensation, Haldwani, Nainital.

2) Claimant respondent no. 1 filed a claim petition under Workmen Compensation Act, for the grant of compensation on account of the death of her husband late Krishna Bahadur Thapa in an accident. According to the claimant her husband was driver on the Tractor of respondent no. 2 S.N.T. Plywood Industries Pvt. Ltd. Gadarpur, District Udham Singh Nagar. On 3.11.2003 his tractor met with an accident resulting the death

Sri Krishna Bahadur Thapa. At the time of his death Sri Krishna Bahadur Thapa was 36 years of age. He was getting Rs.4,000/- per month as salary. Information of the accident was given to the respondent no.2, Manager, S.N.T. Plywood Industries Pvt. Ltd.

3) Respondent no. 2 S.N.T. Plywood Pvt. Ltd. filed its written statement and admitted the alleged accident. It was submitted that the deceased was its employee and was getting Rs.4,000/- per month as salary. The tractor was validly insured with the New India Assurance Company. The driver had valid driving licence and the insurance company is liable to pay compensation, if any, to the claimant.

4) The Claimant Smt. Shanti Devi has filed her affidavit and has proved the allegations made in the claim petition. Opposite party no. 1 S.N.T. Plywood examined Sri Prabhakar Pandey. The claimant filed salary certificate of the deceased, death certificate, Driving licence, P0st mortem report and registration certificate of the tractor.

5) The Workmen's Compensation Commissioner after considering the evidence on record awarded a sum of Rs.2,56,146/- as compensation, after taking into consideration the minimum wages payable to the deceased i.e. Rs.2,632/- per mont, along with interest at the rate of 12% per annum. It has been held that the tractor was insured with the appellant the New India Assurance Co. and the insurance company was held liable to pay compensation to the claimant.

6) Counsel for the appellant Sri R.B. Agarwal, Advocate has submitted that the Workmen Compensation Commissioner has erred in assessing Compensation on the salary of Rs.2,632/- as for the purposes of compensation the salary of more than

Rs.2000/- cannot be considered. The counsel for the appellant has further submitted that the Workmen's Compensation Commissioner has awarded 12% interest which is excessive.

7) Before dealing with the first submission the relevant provision of law as referred by the counsel is quoted below:

"1[4. Amount of compensation. –

(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a) Where death results from the injuriy which-	*An amount equal to **6**[eighty thousand rupees] of the monthly wages of the deceased workman Multiplied by the relevant factor; or An amount of **6**[ninty thousand rupees], which Ever is more;*
(b) Where permanent total the disablement results from the injury.	*An amount equal to **2**[sixty per cent] of monthly wages of the injured workman multiplied by the relevant factor; or An amount of **2**[sixty thousand ever is more;*

Explanation. *– For the purposes of clause (a) and clause (b) "relevant factor" in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.*

Explanation II. – *where the monthly wages of a workman exceed **6**[four thousand rupees], his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be **6**[four thousand rupees] only;*

(c) Where permanent partial disablement results from the injury	*(i) In the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and*
	(ii) In the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Explanation-I. *– Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.*

Explanation II. *– In assessing the loss of earning capacity fro the purpose of subclause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule 1;*

(d) Where temporary disablement whether total or partial result from the injury with	*A half monthly payment of the sum equivalent to twenty five percent of mostly wages of the workman, to be paid in accordance the provisions of sub section (2).*

3*[(lA) Notwithstanding anything contained in sub-section (1), while fixing the amount of compensation payable to a workman is respect of an accident occurred outside India, the Commissioner shall take into account the amount of compensation, if any, awarded to such workman in accordance with the law of the country in which the accident occurred and shall reduce the amount fixed by him by the amount of compensation awarded to the workman in accordance with the law of that country.]*

(2) The half-monthly payment referred to in clause (d) of subsection (1) shall be payable on the sixteenth day -

(i) From the date of disablement where such disablement lasts for a period of twenty-eight days or more, or

(ii) After the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty-eight days; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter

Provided that

(a) There shall be deducted from any lump sum or half-monthly payment to which the workman is entitled the amount of any payment or allowance which the workman his received from the employer by way of compensation during the period of disablement, prior to the receipt of such lump

sum or of the first half-monthly payment, as the case may be; and

(b) No half-monthly payment shall in any case exceed the amount, if any by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages, which he is earning, after the accident.

Explanation. *–Any payment or allowance which the workman has received from the employer towards his medical treatment shall not be deemed to be a payment or allowance received by Wm by way of compensation within the meaning of clause (a) of the proviso.*

(3) On the ceasing of the disablement before the date on which any half-monthly payment falls due there shall be payable in respect of that half-monthly a sum proportionate to the duration of the disablement in that half-month.]

4*[(4) If the injury of the workman results in his death, the employer shall, in addition to the compensation under sub-section (1), deposit with the Commissioner a sum of* [6]*[two thousand and five hundred rupees] for payment of the same to the eldest surviving dependant of the workman towards the expenditure of the funeral of such workman or where the workman did not have a dependent or was not living with his dependent at the time of his death to the person who actually incurred such expenditure.]*

8) So far as the monthly wages of the deceased is concerned the Claims Tribunal has assessed the compensation on the basis of minimum wages i.e. Rs.2,632/- per month. As per explanation II of Section 4 (b) the word Two thousand rupees has been substituted by four thousand rupees vide Workmen's Compensation (Amendment) Act, 2000. Although the claimant

has claimed that the monthly salary of her husband was Rs.4,000/- but the Workmen's Compensation Commissioner has taken minimum monthly wages of Rs.2,632/- for assessment of the amount of compensation, which cannot be said to be illegal or excessive.

9) Counsel for the appellant has next submitted that the interest liability cannot be fastened on the insurer in view of the findings of the Apex Court in the case of New India Assurance Co. vs. Harshad Bai Amrutbhai Modhiya and another, 2006 (2) T.A.C. 321 (S.C.). In this case it has clearly been mentioned that terms of contract of the insurance would depend upon volition of parties and a contract of insurance is governed by the provisions of the Insurance Act. The Apex Court has observed as under:

> *"The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute.*
>
> *Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.*
>
> * * * *

17. We are in this case, no concerned with a case where an accident has occurred by use of a motor vehicle in respect whereof the contract of insurance would be governed by the provisions of the Motor Vehicle s Act , 1988

19. The view taken by us find support from a recent judgment of this Court in P.J. Narayan vs. Union of India and others 2004 A.C.J. 452, wherein it was held:

"1. This writ petition is for the purpose of directing Insurance Company to delete the clause in the insurance policy which provides that in case of compensation under the Workmen's Compensation Ac, 1923, the insurance company will not be liable to pay interest. We see no substance in the writ petition. There is no statutory liability on the Insurance Company. The statutory liability under the Workmen's Compensation Act is on the employer. An insurance is a matter of contract between the insurance company and the insured. It is always open to the insurance company to refuse to insure. Similarly they are entitled to provide by contract that they will not take on liability for interest. In the absence of any statute to that effect, Insurance Company cannot be forced by Courts to take on liabilities, which they do not want to take on. The writ petition is dismissed. No order as to costs."

10) We have considered the aforesaid submission and perused the insurance policy, there is nothing in the policy, which excludes the liability of insurance company with regard to 'Interest'. In the present case there is no exclusion clause in the policy and as such interest part cannot be excluded while awarding compensation to the claimant.

11) Counsel for the appellant then argued that the liability of interest @ 12% per annum is excessive. The relevant provision is quoted below:

> 2(3) *Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall -*
>
> *(a) Direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and*
>
> *(b) If, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty percent of such amount by way of penalty:*
>
> *Provided that an order for the payment of penalty shall not be passed under clans e (b) without giving as reasonable opportunity to the employer to show cause why it should not be passed.*
>
> ***Explanation.-*** *For the purposes of this sub-section, "scheduled bank" means bank for the time*

being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

[3]*[(3A) The interest payable under sub-section (3) shall be paid to the workman or his dependent, as the case may be, and the penalty shall be credited to the State Government.]]*

12) As will appear from section 4A (3) (a) of the Workmen's Compensation Act, that liability of the employer is to pay simple interest at the rate of 12% per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due.

13) In view of above, we find no merit in the appeal. The appeal is hereby dismissed.

14) No order as to costs.

(Rajesh Tandon, J.) **(Rajeev Gupta C.J.)**

November 10, 2006

*Dhyani